CANADIAN CONSTITUTIONAL LAW. — A recent case before the judicial committee of the Privy Council, *Brophy* v. *Attorney General of Manitoba*, 11 *The Times* Law Reports, 198, furnishes some interesting suggestions upon a point which might well have been a burning question of our own constitutional law and history. It is well known that it was seriously proposed and advocated, at one time even agreed upon, in the Convention of 1787, to give to the national legislature power "to negative all State laws contravening," in its opinion, the Federal Constitution. Madison Papers, Elliott's Ed. of 1866, pp. 139, 321. Such a provision is, in substance, to be found in the constitutional statute which defines the powers of the Provincial government of Manitoba, for § 22 of ch. 3 of Canadian Statutes of 1870 provides for an appeal to the Dominion Cabinet from any act of the Legislature "affecting any right or privilege of the Protestant or Roman Catholic minority . . . in relation to education." The decision on appeal to be carried out in the last resort, but "as far only as the circumstances of each case require," by the Dominion Parliament. After prolonged litigation, having for its object a declaration of the unconstitutionality of the Manitoba Education Act of 1890, it was finally declared to be *intra vires*, or, as an American would say, constitutional. *Winnipeg* v. *Barrett*, L. R. [1892] Cr. C., 445. The dissentients then appealed to the Cabinet, and the question framed to secure the opinion of judges upon the power which the Cabinet had finally reached the Privy Council, whose judgment was delivered by Lord Herschell, L. C., *Brophy* v. *Attorney General, ut supra.* Two points make it of interest in the United States. In the first place, the question whether the conditions have been fulfilled which authorize an appeal is quietly but clearly treated as a judicial question, not as a political question for the Cabinet to decide for itself, or even where its mere decision in the first instance is of weight. In the second place, the right of appeal covers, as the express decisions show, ground not covered by the power of the courts to declare acts unconstitutional. This, though due to the language of the Manitoba Constitution, might, it would seem, have happened if the provision had been inserted in our own, for the provision proposed was a power "to negative all laws . . . contravening in *the opinion of the national legislature*," the Federal Constitution. Manitoba has taken the Dominion's negative with bad grace. And with us a negative would probably have created friction and bad blood where the action of the courts is accepted quietly.

MAINTENANCE. — The recent English reports furnish two interesting cases involving the venerable and now somewhat decrepit tort of maintenance. In *Alabaster* v. *Harness* ('95, 1 Q. B. D. 339), the defendant was shown to have maintained one Tibbits in an action of libel brought against the present plaintiff. The defence set up in the present case was that the libel was directed against and affected the defendant Harness quite as much as Tibbits. The court held that this was not such a "common interest" as came within the exception to the rule against maintenance.

In *Grant* v. *Thompson* (11 *The Times* L. R. 207) the facts were as follows. Thompson, wishing to injure one Shibley, procured the plaintiff, a solicitor, to prosecute Shibley for larceny. The plaintiff did so unsuccessfully, and now sues the defendant on his promise to guarantee the plaintiff to the extent of £20. It was objected that the contract was tainted

with the illegality of maintenance. But the court gave judgment for the plaintiff, holding that the doctrine of maintenance did not apply to criminal proceedings. "Maintenance consists in interfering with matters in which the person has no concern. It is for the public benefit that any one should be entitled to prosecute."

In both cases the general propositions as to the law of maintenance are undoubtedly correct. In the second case, however, it is worth while noticing that the defendant was not sued in tort for maintenance, but was sued in contract. While the contract was clearly not tainted with maintenance, it does not follow that it was quite unobjectionable on some other ground of public policy. It is one thing to say every man is entitled to prosecute a criminal action, and another to assist him in making a profit by so doing. It is not the policy of the law to stimulate an improper prosecution, nor to assist those who inaugurate such proceedings. The injured party has, to be sure, his action for malicious prosecution. That is probably one reason why the tort of maintenance has never been applied to criminal actions. But the wrong-doer should not be aided by the court to profit by his tort. If it could be shown that the plaintiff in the principal case knowingly undertook a malicious prosecution, that would seem to be a good defence to the action on the contract. The point was not brought out by the pleadings or argued on the appeal, and perhaps was not justified by the facts.

OFFER AND ACCEPTANCE. — The New York Court of Appeals last December divided almost evenly on a question of some interest to the business community. Two parties had been exchanging letters with a view to an agreement, and finally one made an offer, definite in all its terms, and added, "If satisfactory, answer, and I will forward contract." The reply was, "All right; send contract." When the contract was sent, the other party refused to sign it. A bare majority of the court held that there was a contract. *Sanders* v. *Pottlitzer Bros. Fruit Co.*, 144 N. Y. 209.

It seems to be well settled, as the cases collected in 40 Cent. L. J. 92 show, that the mere fact that parties wish to have a formal agreement drawn up will not prevent their being bound by a previous agreement, if it is clear that such an agreement has been made. *Bonnewell* v. *Jenkins*, 8 Ch. D. 70; *Bell* v. *Offutt*, 10 Bush, (Ky.) 632; *Blaney* v. *Hoke*, 14 Oh. St. 292; *Mackey* v. *Mackey*, 29 Gratt. 158; *Cheney* v. *Eastern Trans. Line*, 59 Md. 557; *Paige* v. *Fullerton*, 27 Vt. 485; *Chinnock* v. *Marchioness of Ely*, 1 De G. J. & S. 638; *Winn* v. *Bull*, Ch. D. 29, 32. On the other hand, if the acceptance is made subject to a written agreement, or if the terms of the bargain are not definitely settled, there is no contract, and in all cases the fact that a subsequent agreement is to be drawn up is cogent, although not conclusive, evidence that the parties do not intend to be bound. *Ridgway* v. *Wharton*, 6 H. L. C. 238; *Winn* v. *Bull*, 7 Ch. D. 29. But when there is a definite proposal, definitely assented to, and when the acceptance is not expressly made subject to a future agreement, it seems more reasonable to suppose that the parties intend the very terms agreed upon to be put into form, than that they intend them to be subject to a future agreement, the terms of which are not expressed in detail. There is in such a case little more than the mere fact that a future agreement is to be drawn up, and that, as already stated, is not enough. A definite offer, accepted in terms, is in most